

IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No.23/681 COA/CIVA

BETWEEN: **BARNABAS BOE and OTHERS**
Appellants

AND: **TELECOMMUNICATIONS and**
RADIOCOMMUNICATIONS REGULATOR
Respondent

Date of hearing: 10 August 2023

Coram: *Hon Chief Justice V Lunabek*
Hon Justice JW von Doussa
Hon Justice R Asher
Hon. Justice OA Saksak
Hon Justice D Aru
Hon Justice E Goldsbrough

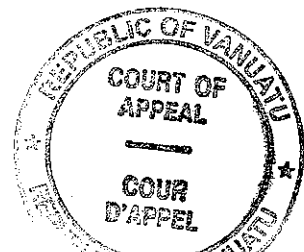
Counsel: *MG Nari for the Appellants*
JC Malcolm for the Respondent

Date of Decision: 18 August 2023

JUDGMENT OF THE COURT

1. This appeal is from a decision of the Supreme Court which dismissed in their entirety separate claims by the nine Appellants who were employees of the Telecommunications and Radiocommunications Regulator (TRR). All the Appellants had been engaged in various roles until the termination of their employment in August 2015. All, save for Mrs Saul, alleged constructive dismissal and in the Supreme Court sought remedies under s. 53(1) of the Employment Act [CAP. 160]. That provision provides:

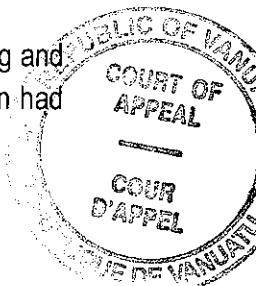
"If an employer ill treats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the contract forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract."



2. In the case of Mrs Saul, her employment was terminated by TRR on notice given on 3 August 2015, but she alleged she was entitled to further compensation beyond that provided for in s.49 of the Employment Act.
3. The several claims of the appellants were consolidated in the Supreme Court and heard together as they arose out of the same set of work place circumstances. Those circumstances concerned differences between the appellants and Mr Ron Box, the regulator of TRR.

The Supreme Court trial

4. At trial, many witness statements from the appellants and others were relied on by the appellants. The statements and exhibits ran into more than 1200 pages. The deponents were cross-examined by counsel for TRR. However, Mr Box filed no statement and gave no evidence. The trial was run by TRR on the basis that the appellants bore the onus of proof of their allegations, which they failed to discharge.
5. Mr Box became the regulator in December 2012. At the time there were 13 staff with 5 sitting at management level. The staff became concerned that the management and leadership styles of Mr Box were, in their opinion, not respectful and trusting to the staff, and did not provide them with proper guidance and support. When Mr Box took over it is clear from the evidence that he imposed tighter management procedures, and communicated with the staff by email rather than by the face to face meeting style of previous regulators.
6. Mr Box introduced a new management structure and changed reporting lines. In the words of one appellant, Mrs Berukilukilu, the new management structure strengthened and tightened Mr Box' powers and micromanaged the TRR in ways that the appellants considered to be disrespectful.
7. In April 2014, the appellants took exception to Mr Box seeking information from them as to their intention to vote at a forthcoming election. Mr Box sought that information to ascertain which of the staff were entitled to invoke the public holiday entitlement of voters in the Port Vila constituency on voting day. The appellants were concerned that confidential information was being sought from them (although as the trial judge found this concern reflected a misunderstanding of the email to staff).
8. The appellants also had concerns that compassionate leave requests by staff were not being processed on a fair and equal basis with leave taken by Mr Box when he returned to Australia for a funeral of his friend.
9. These are but a few of many specific complaints that were made which were said to demonstrate disrespect, ill treatment and an oppressive management style.
10. The dissatisfaction of the appellants and other staff members led to them collectively preparing and signing a petition addressed to the Minister responsible for Telecommunications. This petition had



taken the group at least two weeks to prepare. The petition was also copied to the Minister for Internal Affairs, the Director General for the Prime Minister's Office, the Director of Aid Coordination in the Prime Minister's Office and the Commissioner of the Labour Department. But it was not provided at the same time to Mr Box. The petition is a 15 page document outlining the many complaints of the staff concerning Mr Box' management. By this stage the staff had apparently grown to 18 in number. The petitioners said it was presented by 12 petitioners. However only 10 staff members signed it.

11. The petition recorded that:

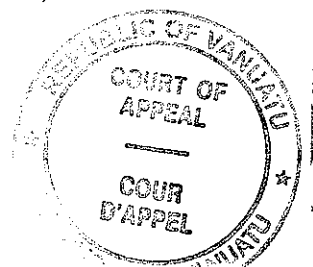
"We make such a statement because we have experienced direct defensive, unprofessional, too personal, disrespectful and defamatory statements made by the Regulator against us as individuals when we raise a grievance or try to address an issue he raised against us individually or as a Team. He does not invite us individually to verbally discuss any issue or concern he has of us or had with us, but he continues to attack us via emails.

He does not like to be advised that he is or could be wrong on certain issues and when he is advised of such, he becomes angry and would usually direct us to never tell him what to do as he is the boss and CEO and to confirm to him by email that we understood his instruction and will comply with decision and direction, furthermore apologize to him for providing the advice or difference of views. This kind of attitude and approach by the Regulator is portrayed with regard to HR issues and other times, matters concerning TRR work functions."

12. The petition made allegations of breach of confidentiality, racism, disrespect of Ni-Vanuatu, dictatorship and bullying (although at trial the appellants failed to identify any evidence of racism). Further it was alleged Mr Box had not been sufficiently transparent since he had assumed his role, and had not made the financial health and position of the organisation clear to management. As the trial judge summarised it:

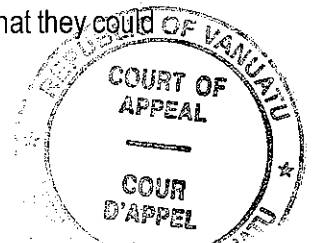
"In short, the petition consists of a litany of complaints not only in respect of Mr Box's management style, something which had clearly created ill-feeling in the workplace, but in respect of his basic competence to undertake the job. ..."

13. In addressing the petition to the Minister (and forwarding it more generally to other officials in the government) the petitioners by-passed a clause in their employment agreements which set out a mechanism for resolving employment relationship problems, and Clause 9.3.3 of the Human Resources Staff Policy that dealt with collective grievances.
14. The petitioners expressed their view that the appropriate and logical avenue for a petition against the Regulator "was directly to the Prime Minister pursuant to section 6 of the TRR Act", which



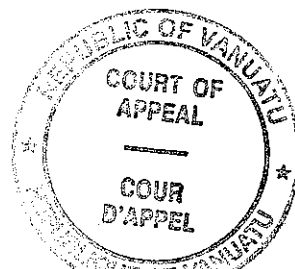
permitted the Minister to terminate or suspend the appointment of the Regulator in certain circumstances. Those circumstances generally apply to serious breaches of his appointment.

15. After the petition was delivered to the Prime Minister's Office, the Director General of that office requested the petitioners to provide evidence of the matters referred to in the petition. The response given on 7 July 2015 consisted of a 4 page document largely repeating what was in the petition.
16. The Appellants on 7 and 8 July 2015 "*stood down*" from work to go to the Prime Minister's Office to request an appointment to see him regarding their petition. They received in response from the Director General an instruction to return to work. They did so on 9 July 2015.
17. It was only then that the Appellants informed Mr Box, by email, about the petition and their "*stand down*" action which had been taken without his permission.
18. The Appellants alleged that Mr Box thereafter became aggressive, and took measures that they considered were disrespectful and amounted to harassment. Locks on doors were changed. Keys were withheld from some people. A security guard was put on the entrance door. Some administrative rights were removed from Mrs Saul. These measures, it seems, were taken by TRR to protect the security of TRR property and information. The trial judge observed in his judgment that it was perhaps not surprising that Mr Box took a firm stand with the employees given that they had not followed the resolution of difficulties processes required by their employment agreements and the staff resources menu.
19. On 13th July 2015, Mr Box sent a staff circular to all labelled "*Administrative and Working Arrangements*". The email acknowledged that it was a positive step that the staff who had stood down had returned to the office to commence work. He notified the staff that he had been advised by the government that in order to prevent hostile and intimidatory acts towards him it was appropriate for him to work remotely for a time. He sought confirmation that until such time as his term as regulator ended the staff will accept and follow the practical administrative procedures set out in the circular and would otherwise comply with their obligations as TRR staff.
20. On 14 July 2015, the Appellants received advice that an officer of the Ministry of Labour had been instructed to commence an investigation into the matters raised by them, and that a report would be available to the Prime Minister and the Ministry of Internal Affairs by the end of July.
21. On 15 July, a meeting was held between the investigator and the Appellants.
22. On 27 July 2015, the Auditor General attended the Office of TRR, presumably for the purposes of investigating the financial operations of the agency.
23. Notwithstanding these developments on 29 July 2015, the Appellants wrote to the Prime Minister enquiring whether their petition had been given due consideration. This letter stressed that they could



not tolerate working under Mr Box's intimidating, bullying and demeaning attitudes. They said: "*We demand that he be suspended immediately while an investigation is undertaken*".

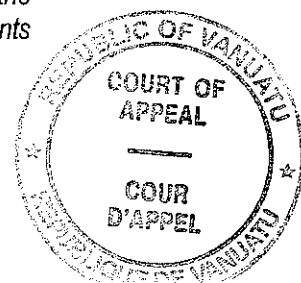
24. Mr Box was not suspended.
25. On 3 August 2015, TRR terminated Mrs Saul's employment on notice. The termination notice was lawful but the trial judge accepted that it may not have been seen that way by the other appellants. Indeed the other appellants said they considered this was very discouraging and unprofessional.
26. On 6 August 2015, the Government Chief Information Officer held a meeting with three staff members other than the Appellants, two of whom had been signatories to the petition. Conflicting evidence was given about this meeting. However a written record said that the Government Officer gave advice that if staff did not support the regulator, the regulator had power to terminate any staff he wished and that would have the full backing of the Prime Minister's Office. This was not a statement made by Mr Box. The report also recorded the view of the officer that if he was not happy with the regulator he would be the first to advise the Prime Minister to dismiss him.
27. On 7 August 2015, the Appellants met at lunch time to discuss termination of their contracts. At that meeting, there was discussion about matters that might cause Mr Box to "*continue to terminate us*".
28. On 8 August 2015, the Appellants terminated their employment, they say pursuant to s.53 of the Act and they gave reasons said to amount to ill-treatment or serious breaches of their terms and conditions of employment. The trial judge in his judgment observed that some of those reasons alleged micro-management and a management style and others said they had taken the termination of Mrs Saul and another staff member as a sign they could be next. Mr Box informed the Appellants that he did not accept the alleged grounds for their termination, and pointed out that a report from the investigator into the matters raised in the petition was due in the next week or so.
29. The dissatisfaction of the Appellants with the management of Mr Box found its way into the public arena. The filing of the petition with the Prime Minister's Office was the subject of an article on the front page of the Daily Post on 8 July 2015 which followed some of the Appellants meeting with a Daily Post journalist. It stated that the petitioners sought the suspension of Mr Box, the Human Resources Manager and the Financial Manager until the matters were fully investigated. On 19 August 2015, two days after the terminations, the Daily Post reported that ten staff members of the TRR had issued termination letters. Then on 19 September 2015, more than 5 weeks after the terminations, TRR lodged an advertisement with the Daily Post to inform the general public that 10 named people including Mrs Saul and six of the Appellants were no longer in the employ of TRR.
30. The Appellants considered the advertisement was defamatory and implied that they had done something wrong, even though the advertisement was factually correct.



31. The topic was again in the press on 2 November 2015 when the chairman of the committee established to conduct the investigation into the matters raised by the petition was reported as confirming that the petitioners had terminated their employment and that Mr Box had desired the Appellants to come back to work. The article indicated that the government was expressing some frustration at the attitudes of the Appellants.
32. On 11 September 2015 Mr Box wrote to each of the Appellants other than to Mrs Saul saying that as they had not returned to work after he refused to accept their resignation by letter of 10 August 2015, TRR considered they had refused to perform their employment duties, and for that reason TRR considered they had engaged in serious misconduct warranting their termination.
33. In a long judgment, the trial judge discussed the evidence led by the Appellants. He concluded:

“Standing back and considering the evidence, there can be no question that Mr Box introduced a management style which was very unlike the management style of his two predecessors. Clearly Mr Box was focused on arm's length, rather than face to face communication, something which I suspect did not sit well with the Melanesian culture. What developed from there is a growing disquiet at the management style being implemented. My impression is that Mr Box saw a number of work practices which he considered needed to be reviewed, and that he was focused on tasks being completed to a high standard. What he clearly did not appreciate, was the need to engage with staff in a more face to face and sensitive way. Some of his emails were terse, blunt, and even confrontational but in my overall assessment, that did not amount to the creation of a toxic atmosphere or display conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust with his employees. There is no doubt that Mr Box was extremely demanding and was clearly not the claimant's "cup of tea." That does not however equate to an environment which is intolerable for an employee. Many employees choose to leave a position because they have difficulties with an employer's approach to management or even have no respect for it. That occurs in work places every day. That is different however from reaching a stage which justifies an employee leaving his or her place of employment on the basis they have effectively been given no choice.

In reaching this view, I am conscious of the fact that each claimant was genuine in the views that they were expressing. They are clearly capable and intelligent people. I am mindful of the fact that they constituted a majority of the employees and that, in itself, is unusual. My assessment of their evidence however is that there was a significant element of "group-think" which took over the workplace and where the claimants, as a collective became convinced that Mr Box's actions were not justified. Some of them were not, but certainly not enough to justify a resignation in circumstances where there was an enquiry being undertaken under the supervision of the Prime Minister regarding the complaints of the claimants. There was nothing which occurred post-petition which justified the step taken by the claimants in terminating their employment. There is insufficient evidence to satisfy me that it was inevitable that they would be terminated and that therefore they jumped before being pushed. I also gained the distinct sense from the evidence that when the claimants' petition was not simply accepted unconditionally by the Prime Minister that came as a significant blow to them and caused further frustration. None of that however justified the self-termination of their employment. For these reasons the applications of the claimants must be dismissed.



34. For those reasons, the trial judge dismissed the Appellants' claims, save that he awarded an agreed sum for outstanding annual leave to Mrs Saul. Costs were awarded against the Appellants.

The Appeal

35. There are three grounds of appeal. The first concerns the claim by Mrs Saul, and grounds 2 and 3 relate to the claims by the other Appellants.

Ground 1: **The Court erred in fact and law by dismissing the claim for compensation for Mrs Saul without considering her evidence at all**

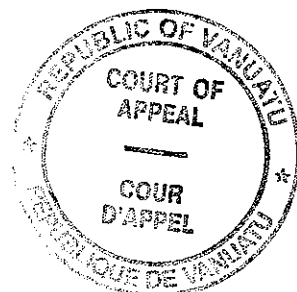
36. The judgment against Mrs Saul is based on evidence that her employment was terminated on notice duly given by TRR pursuant to s.49 of the Employment Act and Clause 9 of her written contract of employment. Both permit the termination of her contract on 3 months' notice with the employer being permitted to make a payment in lieu of notice without requiring the employee to continue working. There was no dispute at trial that this occurred with Mrs Saul.

37. Where a contract of employment is terminated on notice the employer is not required to give any reason for the termination. In her statement of claim Mrs Saul admitted that her employment was terminated on notice given on 3 August 2015, and that she was paid in lieu of notice. In light of this admission it is understandable that her evidence about her perception of her workplace was not analysed in detail in the judgment.

38. Mrs Saul now contends that her evidence established at her contract was in reality terminated for gross misconduct on 9 July 2015 because on that day her duties were restricted pending an investigation into her workplace conduct.

39. It is asserted that from 9 July 2015 she had no work to do. In effect she just sat at her desk doing nothing awaiting the outcome of the investigation. The investigation was still ongoing when she was given notice. During the period 9 July to 3 August 2015 she continued to receive her normal salary.

40. Mrs Saul contends that her contract was terminated for gross misconduct in breach of s.53(1) of the Employment Act because she was given no explanation for the withdrawal of her duties and no opportunity to answer allegations against her: s.53(3) and (4). On this basis she contends that the trial judge was in error in not awarding her compensation benefits that would flow from an employer's breach of s.53. Her appeal also contends that the trial judge failed to award her general damages for breach of her contract of employment, the breach being TRR's withdrawal of her duties on 9 July 2015.



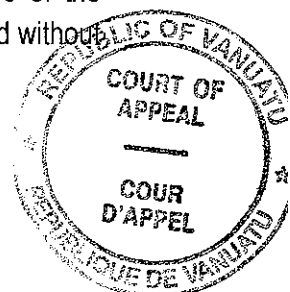
41. These contentions must in our opinion fail. The assertion that Mrs Saul's employment came to an end on 9 July 2015 is inconsistent not only with her pleadings, but with the fact that she continued that work on ordinary pay indicating that her contract of employment was ongoing.
42. The contention that the trial judge failed to award damages for breach of contract cannot be accepted. No claim for breach of contract was pleaded. Only remedies for unjustified termination were sought. More significantly, her evidence failed to show any monetary loss caused by the withdrawal of duties on 9 July 2015. Wages were paid up until notice was given, and thereafter any monetary loss suffered was in consequence of the termination on notice. The judge awarded the agreed amount for the outstanding annual leave.

Ground 2: **The Court erred in fact and law to find that the petition was the basis of the termination of contract under section 53 of the Employment Act**

43. As we understand this ground of appeal it is that the cross-examination of the Appellants and their witnesses focussed mainly on the allegations set out in the petition whereas their evidence also made complaints about the conduct of Mr Box after the petition was lodged. It is argued that the judge paid insufficient attention to matters arising after the petition.
44. It is hardly surprising that counsel for TRR concentrated on the complaints catalogued in the petition during cross-examination. These complaints were specific, and required examination. They were said to be sufficient to warrant the immediate suspension of Mr Box, and therefore were properly to be treated as central complaints by the Appellants. They were said to amount to ill treatment or serious behaviour justifying termination by the employees. As the cross-examination focussed on allegations made in the petition it was appropriate for the trial judge to give them the attention which he did. The judge however did not overlook events occurring after the petition was lodged. These too were identified and considered in the judgment. The judge noted that the reasons given by some of the Appellants for terminating their employment related to events after the petition was lodged.
45. There is no substance in this ground of appeal which is dismissed.

Ground 3: **The Court erred in fact and law by accepting "the statement of defence (filed on 18/10/18)" against the weight the evidence presented by the Appellants.**

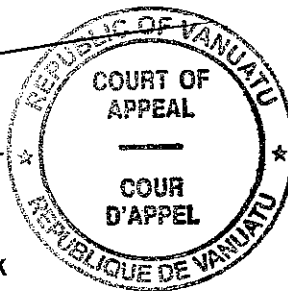
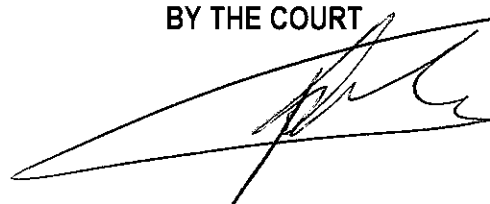
46. The defence addressed the many complaints made in the Appellants' statements of claim, and denied various allegations of mistreatment and the allegations made in the petition. But the assertion that the Court accepted the defence (presumably as if it were sworn evidence) against the weight of the Appellants' evidence is wholly unjustified. The judge recognised that the defendant had not given evidence, and in his lengthy analysis of the evidence considered whether the evidence of the appellants made out their case. He was not satisfied that it did. This conclusion was reached without giving any "weight" to the denials in the defence.



47. In our opinion no error has been demonstrated in the judgment of the Supreme Court and the appeal must be dismissed with costs.
48. Counsel for the Respondent in his submissions considered the question whether the media releases could give rise to claims for additional compensation as part for claim for wrongful dismissal, and to actual monetary assessments claimed by the Appellants in the event that they had made out their case that they were justified in terminating their employment under s.53(1). As the appeal is being dismissed, these questions do not arise.
49. The orders of the Court are:
- (1) Appeal dismissed;
 - (2) Appellants to pay the Respondent's costs to be agreed or taxed.

DATED at Port Vila, this 18th day of August, 2023.

BY THE COURT



Hon. Chief Justice Vincent Lunbabe